Office - Supreme Court, U.S.
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DEC 16 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 82-952, 82-953

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF MARYLAND, et al.,

Appellants,

—v.—

UNITED STATES OF AMERICA and AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,

Appellees.

TANDY CORP.,

Appellant,

—v.—

UNITED STATES OF AMERICA, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF TELEPHONIC EQUIPMENT CORPORATION FOR LEAVE TO INTERVENE

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PRELIMINARY STATEMENT

Telephonic Equipment Corporation ("TEC") moves to intervene in these cases to present certain issues, raised in the Tunney Act proceedings below, that vitally affect private

plaintiffs engaged in litigation against the Bell System defendants.

TEC is a small manufacturer of telecommunications equipment, with annual sales of less than $2,000,000. Defendants' efforts to prevent TEC from selling its products were relied upon by the government as part of its case-in-chief. TEC is about to file antitrust litigation against defendants and, as contemplated by Congress, seeks to rely on the prior government proceeding to the extent feasible.

In the district court's order pursuant to 15 U.S.C. § 29(b), it listed "issues that are of significant importance to the administration of justice." Included among those issues was the "authority of the district court to restrict the use that may be made of the consent decree by private parties." Determination of this question, and a related question under Section 2(e)(2) of the Tunney Act, 15 U.S.C. § 16(e)(2), are important not only to TEC and other companies challenging defendants' past conduct in private suits, but all future private litigants who may seek to rely on government proceedings to assist their litigation efforts.

The only intervenor-appellant which sought to address "private plaintiff" issues did not perfect its appeal. Accordingly, TEC moves to do so.

STATEMENT OF THE CASE

A. United States v. AT&T

United States v. American Telephone and Telegraph Company, et al., Civil Action No. 74-1698 (the "*AT&T* action"), was commenced in November, 1974, in the United States District Court for the District of Columbia. The government alleged that defendants American Telephone and Telegraph Company, Western Electric Company, Inc., and Bell Telephone Laboratories Inc. (collectively, "AT&T" or "defendants") had monopolized a broad variety of telecommunications services and equipment in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

The government and AT&T attempted to reach a settlement in the district court "before any testimony . . . [was] taken," and thereby prevent future private litigants from availing themselves of the *prima facie* case afforded them by Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a) ("Section 5(a)"). 1980-81 Trade Cas. ¶ 63,705. Those efforts failed, and the government's presentation of evidence began on March 4, 1981. After defendants' motion to dismiss at the close of the government's case was denied, 524 F. Supp. 1336, defendants commenced their case on August 3, 1981, and continued their presentation of evidence for five months.

On January 8, 1982, less than one month before trial of the *AT&T* action was scheduled to end, and after approximately 350 witnesses had testified, the parties to that action filed a stipulation in the United States District Court for the District of New Jersey consenting to the "modification" of a final consent judgment that had been entered by that court in 1956 in *United States v. Western Electric Company, Inc., et al.*, Civil Action No. 17-49 (the "*Western Electric* action"). Simultaneously, the parties sought to file a stipulation of dismissal of the *AT&T* action. Judge Vincent Biunno of the New Jersey district court immediately approved the proposed modification of the 1956 consent judgment, but Judge Harold Greene, who presided over the *AT&T* action in the District of Columbia, ordered that the stipulation of dismissal in the *AT&T* action be lodged, not filed, until public interest proceedings contemplated by the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b) *et seq.* (also known as the "Tunney Act"), were completed. Thereafter, the *Western Electric* action was transferred to the District Court for the District of Columbia, docketed under Civil Action No. 82-0192, and consolidated with the *AT&T* action. Judge Greene then vacated Judge Biunno's approval of the proposed modification, and ordered that Tunney Act procedures be employed.

B. The Tunney Act Proceedings

In an order dated February 5, 1982, the district court established a sixty-day comment period on the proposed consent decree, pursuant to Section 2(b) of the Tunney Act. The district court also created a separate public interest proceeding docket, Misc. No. 82-0025 (PI), for the filing of all documents that related to the Tunney Act proceedings.

In accordance with Section 2(b) of the Tunney Act, the government filed a competitive impact statement, and thereafter numerous participants, including TEC, filed comments. TEC was one of a number of companies which called on the court to require certain modifications and conditions that would protect the rights of private plaintiffs asserting claims against defendants.

First, to prevent the apparent effort by the government and defendants to nullify Section 5(a), TEC requested that the third sentence of Section III of the proposed decree be stricken. That sentence states:

> "Neither this Modification of the Final Judgment nor any of its terms or provisions shall constitute any evidence against, admission by, or any estoppel against any party [or Bell Operating Company]."

For the same reason, TEC called on the court to insist that the decree be entered in the *AT&T* action, and not as a modification of the *Western Electric* judgment (on which no testimony had ever been taken).

Second, TEC urged the court to consider "[t]he impact of entry of [the proposed decree] . . . upon . . . individuals alleging specific injury from the violations set forth in the complaint including the public benefit, if any, to be derived from a determination of the issues at trial," as provided for in Section 2(e)(2) of the Tunney Act, 15 U.S.C. § 16(e)(2). As an alternative to a rejection of the decree on this basis, TEC urged the court to consider conditioning its approval of the decree on

defendants' acceptance of reasonable conditions that would assist private plaintiffs in litigation related to the *AT&T* action.

C. Judge Greene's opinion

On August 11, 1982, the district court issued an opinion approving the proposed consent decree (with certain exceptions that are not now germane), and on August 24, 1982, entered two orders permitting the dismissal of the *AT&T* action, and the filing of the consent decree as a modification of the final judgment in the *Western Electric* action. The court declined to strike the third sentence of Section III. Instead, it relied on this sentence in suggesting that, despite Section 5(a), "the judgment herein would not have a *prima facie* effect in private litigation." Opinion, at 147-48. Also, while both the government (in its competitive impact statement) and the defendants had contended that Section 5(a) was inapplicable because the decree was being entered in the *Western Electric* action, and not the *AT&T* case, the district court permitted the decree to be entered in the *Western Electric* action, describing this "defect" as only a "technical [one which] does not affect substantive rights and duties." Order dismissing *AT&T* action, at 1. Finally, the court adopted a standard for considering whether it should approve the decree that expressly excluded "consideration of the public benefit, if any, to be derived from a determination of the issues at trial," despite its recognition that this criterion "directs the Court to consider the effect of the proposed decree upon the ability of private antitrust plaintiffs to recover against the defendant for injuries alleged to have resulted from the activity challenged in the government [suit]." Opinion, at 35 n. 93.

D. TEC's Motion to Intervene

TEC moved to intervene in the district court on September 1, 1982 for the purpose of appealing Judge Greene's opinion, but the court denied TEC's motion as untimely. TEC appealed that denial to the United States Court of Appeals for the

District of Columbia Circuit, and, after another intervenor moved pursuant to 15 U.S.C. § 29(b) for direct review of all appeals by this Court, TEC submitted a similar motion for direct review. In an order dated November 10, 1982, Judge Greene granted all the motions for direct review except that of TEC. In that order he stated:

> "it would not be in the public interest or the administration of justice to have two review proceedings involving this one case proceeding simultaneously—one by way of an immediate appeal to the Supreme Court and the other by a more lengthy review proceeding through the Court of Appeals. Such a procedure would also be contrary to the basic purpose of the Expediting Act."

Order, at 4.

Despite this statement, Judge Greene declined to act on TEC's motion for direct review, and TEC's appeal is accordingly still in the court of appeals. That appeal is believed to be the only one involving the *AT&T* or *Western Electric* actions that is not now before this Court.

REASONS FOR GRANTING THIS MOTION

THE RIGHTS OF POTENTIAL PRIVATE PLAINTIFFS SUCH AS TEC WILL BE VITALLY AFFECTED BY THE PROPOSED DECREE, AND THERE IS PRESENTLY NO REPRESENTATIVE IN THIS COURT TO DEFEND THOSE RIGHTS.

TEC's appeal should have been certified by the district court for direct review, pursuant to 15 U.S.C. § 29(b), to ensure that TEC had the opportunity to protect its interest before this Court and to avoid simultaneous proceedings before this Court and the court of appeals. *See, e.g., Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 132 (1967); *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961); *Allen Calculators, Inc. v. National Cash Register Co.*, 322

U.S. 111 (1944); *United States v. California Cooperative Canneries*, 279 U.S. 553 (1929).

In any event, TEC respectfully submits that it should be permitted to intervene in the proceedings before this Court, because its rights and the rights of other potential private plaintiffs have been vitally affected by the proposed consent decree, there presently is no other representative in this Court to defend these rights, and TEC will lose the opportunity to protect effectively these rights if intervention is denied. Intervention has been granted by this Court in similar circumstances, *see, e.g., Labor Board v. Acme Industrial Co.*, 384 U.S. 925 (1966); *Eastern-Central Motor Carriers Ass'n v. United States*, 321 U.S. 194, 198-99 (1944); *United States v. Terminal R.R. Ass'n*, 236 U.S. 194, 199 (1915), and it clearly would serve the interests of justice in this case.

A. The District Court Erred When It Sought To Limit The Use That May Be Made Of The Consent Decree By Private Parties.

In its order pursuant to 15 U.S.C. § 29(b) on November 10, 1982, the district court recognized the "significant importance" of the question of its "authority . . . to restrict the use that may be made of the consent decree by private parties." Order, at 3. As mentioned earlier, the district court approved the decree despite the provision therein that it "shall not constitute any evidence against, admission by, or any estoppel against any party . . .," and also permitted the decree to be entered in the *Western Electric* action, not the *AT&T* suit.

Section 5(a) of the Clayton Act provides:

> A final judgment or decree . . . rendered in any . . . proceeding brought by . . . the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree

> would be estoppel as between the parties thereto: *provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken. . . .

A consent decree entered in a government antitrust action after testimony has been taken is typically entitled to be used at least as *prima facie* evidence in subsequent private civil litigation based on the government's case. *See Y&Y Popcorn Supply Co. v. ABC Vending Corp.*, 263 F. Supp. 709, 712-13 (E.D. Pa. 1967); *State of Michigan v. Morton Salt Co.*, 259 F. Supp. 35, 61-63 (D. Minn. 1966), *aff'd sub nom. Hardy Salt Co. v. State of Illinois*, 377 F.2d 768 (8th Cir. 1967);[1] *see also Sablosky v. Paramount Film Distributing Corp.*, 137 F. Supp.

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1 In this case, the court held that a civil consent decree, entered into by defendant International Salt Company before the government's civil trial, but after a criminal trial in which International was acquitted, was entitled to *prima facie* effect in subsequent private actions under Section 5(a). The court reasoned that the *proviso* clause of Section 5(a), which would have precluded such a *prima facie* effect, was "meant to encourage prompt capitulation, thereby saving the Government the time and expense of a full scale trial." *Id.* at 62. It concluded that "no saving was passed on to the United States" in this instance, because testimony had already been taken at International's criminal trial, and that testimony was a principal basis of the government's non-jury civil trial. *Id.*

The decree in *Morton Salt* contained a recital that "it was entered . . . without adjudicating any question of law or fact." *Id.* at 62. The court explained that such an exculpatory recital cannot prevent a court in a subsequent private civil action "from considering whether it would be consistent with the purpose of Section 5(a) to allow the decree to exempt a defendant from the *prima facie* rule." *Id.* The court stated that Section 5(a) "should not be construed to demand an explicit statement in the judgment or decree that Defendant X has violated the antitrust laws. Judged in light of what the complaint charged, it is possible to ascertain that International's consent decree effectively determines that it violated the antitrust laws." *Id.* at 62. The same is also true in the present case in which the government secured defendants' agreement to the most substantial divestiture in the history of the antitrust laws. *Cf. Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 485 (1968).

929 (E.D. Pa. 1955); *DeLuxe Theatre Corp. v. Balaban & Katz Corp.*, 95 F. Supp. 983 (N.D. Ill. 1951); *Twin Ports Oil Co. v. Pure Oil Co.*, 26 F. Supp. 366, 371 (D. Minn. 1939).

The intent of this Section was "to minimize the burdens of litigation for injured private suitors" in their actions for damages against violators of the antitrust laws. *Emrich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568, (1951). *Accord Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 319 (1965); *Windham v. America Brands, Inc.*, 538 F.2d 1016 (4th Cir. 1976); *Wendkos v. ABC Consolidated Corp.*, 379 F. Supp. 15 (E.D. Pa. 1974); H.R. Rep. No. 96-874, 96th Cong. 2d Sess. 4, *reprinted in* [1980] U.S. Code Cong. & Ad. News 2752, 2754.

While the district court's opinion correctly recognized that the ultimate decision concerning the *prima facie* effect of the decree under Section 5(a) must rest with the court that presides over the private litigation, Opinion at 148; *see State of Michigan v. Morton Salt Co.*, 259 F. Supp. 35, 61-63 (D. Minn. 1966), *aff'd sub nom. Hardy Salt Co. v. State of Illinois*, 377 F.2d 768 (8th Cir. 1967); *see also Emrich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 569-71 (1951), the court erred when it permitted language to be included in the decree which purported to answer the question.

In addition, the district court should have required that the decree be entered in the case which was being settled; that is, the *AT&T* action, and not the *Western Electric* action. While the opinion characterizes the *Western Electric* ploy as a "transparent device" to "escape either the mandate of the law or the possibility of liability," Opinion, at 147, it ultimately approved this "defect," believing it to be only "technical and [one which] does not affect substantive rights or duties." Order dismissing the *AT&T* action, at 1. In earlier filings, however, both the government and defendants had contended that Section 5(a) was inapplicable because the decree was being entered in the *Western Electric* action, and not the *AT&T* case, and defendants will undoubtedly do so again. In light of the position of

the parties, the court erred when it permitted the decree to be entered in the *Western Electric* action.

B. The District Court Erred When It Adopted A Standard For Evaluating The Decree That Excluded "Consideration Of The Public Benefit, If Any, To Be Derived From A Determination Of The Issues At Trial."

Congress's desire to assist private plaintiffs is also reflected in the Tunney Act. Section 2(e)(2) of the Tunney Act provides in part:

> (e) Before entering any consent judgment proposed by the United States under this Section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—
>
> * * *
>
> (2) The impact of entry of such judgment upon . . . individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

See S. Rep. No. 93-298, 93rd Cong. 2d Sess. 6-7, *reprinted in* [1974] U.S. Code Cong. & Ad. News 6535, 6539; *United States v. Associated Milk Producers, Inc.*, 394 F. Supp. 29, 43 (W.D. Mo. 1975), *aff'd*, 534 F.2d 113 (8th Cir.), *cert. denied*, 429 U.S. 940 (1976).[2]

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2 Similarly, Section 2(b)(4) of the Tunney Act provides that the government must file, along with its proposed consent decree in a civil antitrust case, a competitive impact statement that recites, *inter alia*,

> (a) the remedies available to potential private plaintiffs damaged by the alleged violation [of the antitrust laws] in the event that such proposal for the consent judgment is entered in such proceeding.

Although the district court recognized that this provision "directs the court to consider the effect of the proposed decree upon the ability of private antitrust plaintiffs to recover against the defendant for injuries alleged to have resulted from the activity challenged by the government," it viewed this factor as "secondary," and adopted a standard for determining whether the decree should be approved which expressly excluded this consideration. Opinion, at 35 n. 93.

The district court did indicate that the "vigor with which several private plaintiffs have pursued actions against AT&T indicates that further prosecution of the government's case is not warranted on this basis." *Id.* While it is true that large companies such as MCI Telecommunications Corp. and Litton Industries, Inc. have been able to pursue such claims against defendants, and to secure very large judgments, smaller companies face enormous obstacles in taking on the largest company in the world, a company which has already spent hundreds of millions of dollars seeking to defend its conduct. The government spent seven and a half years and a great deal of money to substantiate its charges against defendants. Congress contemplated that private plaintiffs would benefit from such efforts.

If the government's case had gone to judgment, future plaintiffs would have been able to avail themselves of the doctrine of collateral estoppel. TEC does not contend that the court was required to reject the proposed decree on this basis and force the parties to conclude the trial. It urges, however, that the court did err when it refused even to consider that possibility (or, as an alternative, to consider what reasonable conditions might have been imposed on defendants to assist plaintiffs asserting private claims).[3]

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3 In view of the court's familiarity with what had transpired, TEC called on the court to address this final issue independently. Among TEC's suggestions for the court's consideration were: (1) that defendants to the *AT&T* action agree to stipulate with private plaintiffs any fact that they stipulated with the government; (2) that a depository be

CONCLUSION

The motion of Telephonic Equipment Corporation for leave to intervene in these proceedings should be granted for the reasons stated above.

Dated: New York, N.Y.
December 15, 1982

Respectfully submitted,

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created in AT&T's headquarters in New York and the District of Columbia for hard copies of all documents and computer files relating to the *AT&T* action; (3) that defendants furnish, at their expense, copies of AT&T discovery materials to future private plaintiffs if those materials are relevant to the future litigation; (4) that "records retention" policies presently in effect in the AT&T action continue for at least one year, and thereafter so long as any private litigation relating to the *AT&T* action is pending; (5) that deposition and trial testimony taken in the *AT&T* action be admissible aganst defendants in relevant future private litigation; (6) and that the documents introduced at the *AT&T* trial, or stipulated to be authentic prior to that trial, be deemed authentic under Rule 901 of the Federal Rules of Evidence in relevant future private litigation against defendants. In addition, TEC suggested that the district court consider making specific findings of fact, based upon the record that was made, in order to assist future courts that are called upon to consider the effect to be given the proposed judgment.